In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 83

RICHARD MCALLISTER,

Petitioner,

v.

MAGNOLIA PETROLEUM COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District

BRIEF ON THE MERITS FOR RESPONDENT, MAGNOLIA PETROLEUM COMPANY

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STATEMENT OF THE CASE

Petitioner, a seaman, filed suit on August 27, 1953 (R. 1), for damages allegedly sustained as a result of a fall on October 19, 1950 (R. 17). Petitioner alleged ten specific acts of negligence (R. 6) and also unseaworthiness in two particulars (R. 7). Trial was to a jury, which in response

to special interrogatories found: Plaintiff fell and sustained a bodily injury (R. 358); certain portholes (R. 358) and a specified deck (R. 362) were not "watertight," but that such conditions did not make the crewship unseaworthy (R. 359 and 362); that the deck and ports not being watertight was not due to negligence (R. 360 and 363); that the ports in question were maintained in proper repair (R. 360); that plaintiff's shoes were wet before he attempted to descend the ladder (R. 365), but that it was not negligence for him to use the ladder with his shoes being wet (R. 365); that the injuries were the result of an "unavoidable accident" (R. 366); that there was no oil on the step (R. 361); that plaintiff would reach maximum recovery on September 11, 1956 (R. 367); and that the amount of his damages was $32,500.

Based on these findings, the trial court entered judgment for petitioner for $6,258 for maintenance. The trial court did not hold that plaintiff's action for indemnity was barred. The Court of Civil Appeals of the Fifth Judicial District affirmed the judgment and respondent has paid petitioner the amount decreed.

Either here or below, petitioner has not complained of error relating to his claim for indemnity due to negligence. Petitioner does complain of the trial court's form of submission for the interrogatories relating to unseaworthiness simpliciter. Respondent in the court below urged affirm-

ance because of the Texas statute of limitation; because the transient nature of the substance alleged to be on the tread did not render the vessel unseaworthy; because the jury found no water on the steps; because jury found no oil on ladder; because plaintiff had not preserved his points on appeal by properly requesting interrogatories essential to his recovery. The Court of Civil Appeals decided the case on the sole point of law that the action was barred, and did not pass on petitioner's points of error or on respondent's counterpoints.

Petitioner plead and tried his case on the theory of a foreign substance on the ladder causing the fall. The jury exonerated the defendant in all particulars, the trial court entered judgment on the findings (R. 381-395), and the Court of Civil Appeals affirmed, but on the sole point that the action reserved for appeal was barred by *Article 5526, Vernon's Annotated Civil Statutes of Texas.*

QUESTIONS PRESENTED FOR REVIEW

Respondent asserts that the fourth of petitioner's listed questions presented for review (Respondent's Brief, p. 5) is not properly before this Court because petitioner at the trial failed to tender a properly phrased issue, a necessary predicate under *Rule 277, Texas Rules of Civil Procedure*, and because it was not passed upon by the Court to which certiorari issued.

COUNTER PROPOSITION NUMBER ONE

A seaman asserting a cause of action based on non-negligent unseaworthiness in a state court must bring his claim within the applicable period of limitation prescribed by the law of the forum.

ARGUMENT AND AUTHORITIES

In this case the facts are determined. The jury binds the litigants to its version of the event upon which petitioner's claim is founded. The Seventh Amendment to the *Constitution* limits review by Federal Courts. The jury-found facts are: Plaintiff fell and sustained injuries. Special Issue No. 31 (R. 366 and R. 392), together with its accompanying instructions:

> "Do you find from a preponderance of the evidence that the injuries, if any, sustained by plaintiff McAllister, at the time and on the occasion in question, were not the result of an unavoidable accident?
>
> "Let the form of your answer be 'They were not the result of an unavoidable accident' or 'They were the result of an unavoidable accident.'
>
> "In connection with the foregoing special issue you are instructed that the term 'unavoidable accident' means an event occurring without the negligence of plaintiff McAllister or the defendant Magnolia Petroleum Company, its officers, agents or employes.
>
> "ANSWER: They were the result of an unavoidable accident."

is a complete exoneration of any negligence by defendant. Special Issue No. 6 (R. 360) found no negligence in failing

to keep the ports and windows "watertight." Special Issue No. 7 (R. 360) found defendant kept such windows in proper repair. Special Issue No. 16 (R. 363) found there was no negligence in failing to keep the deck "watertight." There were no other negligence submissions. Thus defendant was exonerated from specially pleaded acts of negligence, and generally exonerated from all acts of negligence by the finding of unavoidable accident. Plaintiff did not make any complaint below as to any error at trial relating to negligence, and the opinion of the Court of Civil Appeals so holds (R. 422).

No appeal having been taken from the portion of the judgment denying recovery for negligence, the court below had only to consider points of appeal relating to the method of submission of the issues relating unseaworthiness simpliciter. The court did not reach those points, for it held the cause of action was barred by *Art. 5526, Sec. 6, Vernon's Annotated Civil Statutes of Texas.*

The general statute of limitation provided in *Sec. 6, Art. 5526, Vernon's Annotated Civil Statutes of Texas* (Appendix A), is procedural. *Gautier v. Franklin, 1 Tex. 732 (1846); Tilliard v. Hall, 32 S. W. 863 (1895).* Such a statute affects the remedy and not the right. *Campbell v. Haverhill, 155 U. S. 610 (1895).* A state may freely prescribe procedural rules for its courts to apply even in cases involving the enforcement of Federal rights. *John v. Paullin, 231 U. S. 583 (1913).*

Petitioner argues that the *Jones Act, 46 U. S. C. A. 688*, (Appendix C), provides a uniform period of limitation for any action by a seaman for personal injuries in course of employment.

Respondent agrees that for any recovery under the *Jones Act* the period there prescribed will control, but urges that petitioner's cause of action here is not a *Jones Act* cause of action.

The scope of the *Jones Act* is no greater than the *Federal Employers' Liability Act* (Appendix B). Liability under the *Jones Act* exists only for negligence. This Court has so held in *Cortes v. Baltimore Insular Line, 287 U. S. 367; DeZon v. American President Lines, 318 U. S. 660; Engel v. Davenport, 271 U. S. 33.*

The *Federal Employers' Liability Act* contains a substantive period of limitation. *45 U. S. C. A., Sec. 56.*

> "No action shall be maintained *under this chapter* unless commenced within three years from the day the cause of action accrued." (Emphasis added.)

The provision is expressly confined to actions maintained under "this chapter." The only actions provided in the chapter are those based upon negligence.

The jury findings in the trial preclude petitioner's cause of action being based on negligence.

At least as early as *The Osceola, 189 U. S. 158*, an owner is liable to indemnify a seaman for an injury resulting

from the unseaworthiness of the vessel or its appliances. Unseaworthiness is a condition. Unseaworthiness may result from a preventable act or omission (negligence) or from any other cause.

In *Engel v. Davenport*, 271 U. S. 33, this Court recognized that the passage of the *Jones Act* made it important to determine whether unseaworthiness resulted from negligence.

> "The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence, but also, under sec. 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. * * *."

The holding extended the permissible period of filing in cases founded on unseaworthiness due to negligence.

The Second Circuit, in *McGhee v. United States*, 165 F. 2d 237, interpreted *Engel v. Davenport, supra:*

> "* * * In Engel v. Davenport, the question was whether the statute of limitations applicable to railway employees governed an action brought by a seaman under the Jones Act in a state court. The plaintiff had declared for injuries suffered from a defective appliance and had charged that the defect was negligent. The court held that he was privileged to base his recovery upon the Jones Act; and that, if he did, he was free to take advantage of the longer limitation applicable to that cause of action than the state statute would have allowed, had he sued under the maritime law. That did indeed recognize a cause of action under the Jones Act for negligent unseaworthiness, additional to that under the maritime law; and obviously the plaintiff was bound to prove negligence, if he wished to invoke the longer period. * * *.
>
> "* * *
>
> "* * Had this added allegation—negligence—been necessary to his recovery for unseaworthiness as it was in Engel v. Davenport, supra, and in Kruschman v. United States, supra, he would of course have had to prove it. * * *."

Borgman v. Sword Line, Inc., 81 N. Y. S. 2d 445 (*New York Supreme Court*), supports respondent's position.

Petitioner's argument that all actions by seamen are controlled by the *Jones Act* is specious. This Court, in *The Arizona v. Anelich*, 298 U. S. 110, and in *Beadle v. Spencer*, 298 U. S. 124, refused to apply the defense of assumption of risk which then existed in railroad cases to seamen, thus recognizing that only a part of maritime law was changed by the Act.

APPENDIX D

Texas Rules of Civil Procedure

Rule 277. Special Issues

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

Petitioner states the holding below is in conflict with previous decisions of this Court. An analysis of those cases disproves the statement. *Cox v. Roth, 348 U. S. 207*, was a *Jones Act* case, and recovery was sought for negligence. *Baltimore Steamship Co. v. Phillips, 274 U. S. 316*, holds that under his election the seaman must seek recourse for all grounds of recovery in a single lawsuit. *Panama Railway v. Johnson, 264 U. S. 375*, does not bear on the issue here, but does recognize that the *Jones Act* did not effect a merger of a seaman's rights into only that provided by the Act. *Seas Shipping Co. v. Sieracki, 328 U. S. 85*, and *Alaska Steamship Co. v. Petterson, 347 U. S. 396*, also cited by petitioner, are not *Jones Act* cases, but were applications of the general maritime law doctrine of unseaworthiness to seamen who were not employees.

If petitioner's premise regarding the effect of the *Jones Act, supra*, on state-prescribed limitations be correct, this Court would never have had an opportunity to consider its famous case of *Mahnich v. Southern Steamship Co., 321 U. S. 96, 135 F. 2d 602 (3d Cir.)*. That case was filed in admiralty long after the *Jones Act* cause had become barred. This Court remanded the case for trial, thus holding the cause of action was not barred.

Many states permit actions for unseaworthiness to be brought after three years. In New York the permissible period is six years. *Le Gate v. The Panamolga, 221 F. 2d 689 (2d Cir.)*, and *Oroz v. American President Lines, 154 F. Supp. 241 (S. D. N. Y.)*.

Petitioner's argument would radically shorten the period in such states as New York and would in reason extend to admiralty cases.

Applied to its logical conclusion, petitioner's "rule" would require a holding that the *Jones Act* created a right of action for wrongful death not resulting from negligence, a contrary holding to that of *Cox v. Roth, supra*, and of *The Wm. A. McKenney, 41 F. 2d 754*, and similar cases.

In summary, when the seaman asserts an action for unseaworthiness in a state court, he must bring this action within the state-prescribed period if it is based upon unseaworthiness occurring without negligence, but may bring it within the period prescribed by the *Jones Act* if based on negligence. Stated conversely, the *Jones Act* period, when applicable because of negligent unseaworthiness, will be applied to extend but not to shorten the period provided by the local law.

In the case at bar, the court below properly announced and applied the rule.

COUNTER PROPOSITION NUMBER TWO.

Petitioner's points of error do not constitute reversible error and were not passed upon by the court below.

ARGUMENT AND AUTHORITIES

The sole point of error relied upon by petitioner below relates to that portion of the charge relating to unseaworthiness.

The court below did not reach a consideration of the point and consequently no holding or ruling by such court is before this Court.

The complaint of error made by petitioner to the court below is not sufficient because not based on a properly phrased issue tendered to the trial judge before the charge was given to the jury. *Rule 277, Texas Rules of Civil Procedure* (Appendix D).

Petitioner's requested instructions in connection with Special Issues Nos. 3 (R. 372) and 13 (R. 374) are substantially alike and each contains the fatal defect of being an incorrect instruction because each assumes the very fact sought to be determined, namely, that the appurtenance "was not reasonably fit for the purposes for which said * * * was used." Under Texas law, the petitioner was required to submit a correct instruction and hence he did not preserve his objection to the court's charge.

The court's charge on unseaworthiness was correct, but even if incorrect was taken from petitioner's pleading and thus cannot be complained of by petitioner.

Petitioner alleged:

> "* * * That said fall * * * was caused * * * by the unseaworthiness of the vessel J. C. STEPHENS as hereinafter shown." (R. 5.)

and

> "* * * that as a concurrent cause of the injuries sustained by him was the unseaworthiness of the said J. C. STEPHENS. * * *." (R. 7.)

then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941.

These allegations evidence that petitioner understood that a defective appliance renders the vessel unseaworthy. The court took its charge in this respect from petitioner's own pleading, a practice which has never been held to be reversible error at the instance of the pleader. *Gray County Gas Co. v. Oldham, 238 S. W. 2d.596 (Tex. Civ. App.); 41B Tex. Jur. 614.*

In *Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U. S. 336,* this court quoted with approval the following language:

> "The warranty of seaworthiness as to hull and gear has never meant that the ship shall withstand every violence of wind and weather; all it means is that she shall be reasonably fit for the voyage in question."

The vessel must be seaworthy and the court's charge so stated.

The court did not give the instruction quoted at page 35 of Petitioner's Brief. Petitioner has altered or misquoted the instruction accompanying Special Issue No. 3, by substituting the definite article "the" for the indefinite article "a." (R. 359.)

Perhaps the instruction could have been correctly given using other words, but those used were themselves correct. The Issues 3 and 14 each followed an inquiry about the watertight condition of a specific portion of the vessel. Issue 3 and Issue 14 were conditionally submitted, that is, the jury was informed that it need not answer the issue if it had found the condition inquired about in the preceding

issues did not exist. No jury could fail to know that Issues 3 and 14 inquired of the condition found to exist in the previous interrogatory.

The *ex parte* affidavits of jury members, to which counsel refers, are not properly a part of the record. It would, indeed, be strange law if losing counsel in a lawsuit could convince individual jurors of their mistaken interpretation of the court's charge, and thus be entitled to a new trial.

The jury's other findings affirmatively show that it found the vessel to be seaworthy. The jury expressly found that the respondent did not fail to keep the ports and windows in proper repair. (R. 386.)

The findings that certain windows and ports (Special Issue 2, R. 384) and a certain deck (Special Issue 13, R. 387) were not "watertight" mean only that some indeterminate quantity of water could, under some conditions, pass into the spaces within the crewship. The essential elements of petitioner's action for unseaworthiness were: (1) petitioner sustained an injury; (2) the injury resulted from a fall caused by sea water on the step; (3) the sea water was there because of a defective condition of the vessel. Petitioner wholly failed to prove either that sea water was on the step or that sea water, if on the step, got there due to a defective condition of the vessel. The finding of non-watertightness of specific portions of the vessel does not include a finding that water passing into the vessel at one place found its way to another, or that water passed into the vessel on the occasion of plaintiff's fall.

The jury fact that petitioner's shoes were wet before he attempted to descend the galley steps (R. 391) as a matter of law precludes the alleged, but unproved, wet step from being a cause of the fall, unless plaintiff could show that more water than was on his shoes made the steps more slick. Quite the contrary is shown by the record. The witnesses Vandeveer (R. 312) and Barkley (R. 327) throughout their entire testimony proved as a scientific and unrefuted fact that on the particular step from which plaintiff fell, the presence of water, either fresh or salt, increased the coefficient of friction in contact with a leather shoe sole such as plaintiff wore (R. 87) and thereby reduced the likelihood of slipping. Vandeveer (R. 322) testified:

> "Q. Translating that in terms of slipperyness when used by a shoe sole, what do you find?
>
> "A. I find it more—based on those tests—it more difficult to slip when there is water on the step, sea water on this step, or oil on this step, or film on this step than a dry step."

The witness Barkley testified his tests performed as shown in Defendant's Exhibit 30 (R. 353, offered R. 331) were performed with the step saturated with the test fluid (R. 330) and that it took more pull to make a man slip from a wet step than from a dry step (R. 329).

Respondent submits that the presence of sea water could not have been a cause of the accident.

Even had plaintiff proved that water had got on the step through a defect of the vessel, he still has not proved unseaworthiness, since under the doctrine of *Cookingham*

v. United States, 184 F. 2d 213 (3d Cir.), cert. den. 340 U. S. 935; Shannon v. Union Barge Line Corp., 194 F. 2d 584 (3rd Cir.), cert. den. 344 U. S. 846; Holliday v. Pacific Atlantic S. S. Co., 99 F. Supp. 173 (D. C. Delaware), and similar cases, a condition resulting from a transient substance on the tread of a ladder does not render the vessel unseaworthy.

Finally, the petitioner has failed to show reversible error because he did not seek nor obtain a fact-finding that there was sea water upon the step. Plaintiff's trial theory was that there was oil upon the step. This issue he did submit, and the jury expressly found that the top step in question was not coated with oil (Special Issue No. 9, R. 386). He made no request for the submission of a similar issue as to the fact of water or substance other than oil upon the step in question. Consequently, the court did not submit nor did petitioner request the submission nor object to the failure to submit such an issue. After the verdict for the defendant, petitioner still had an opportunity under *Rule 279, Texas Rules of Civil Procedure;* to request the finding of such a fact by the trial court. This he did not do; neither did he assign the failure to find such fact as error in his motion for new trial.

The situation thus was that which is provided for in that portion of *Rule 279, Texas Rules of Civil Procedure*, which reads as follows:

> "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested

shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment; but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. * * *."

Petitioner's situation is analogous to that of a plaintiff in a negligence case whose sole point of appeal is a complaint of the form of the special issue inquiring whether the alleged act constituted negligence and where the jury has found that the act itself did not occur. Certainly this is a clear situation for the application of *Rule 434, Texas Rules of Civil Procedure* (Appendix D), which enjoins the appellate court to reverse only where "the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case."

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the judgment of the court below be affirmed, and, in

the alternative, that the case be remanded to the Court of Civil Appeals of the Fifth Supreme Judicial District for further consideration of the case.

Respectfully submitted,

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APPENDIX A

Article 5526, Sec. 6, Vernon's Civil Statutes of Texas, Annotated (1925)

Art. 5526. Actions to be commenced in two years

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

* * * * *

6. Action for injury to the person of another.

APPENDIX B

Federal Employers' Liability Act

45 U. S. C. A. Sec. 52. Carriers in Territories or other possessions of United States.

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tract, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, sec. 2, 35 Stat. 65.

Sec. 56. Actions; limitations; concurrent jurisdiction of courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, sec. 18, 62 Stat. 989.

APPENDIX C

Jones Act

46 U. S. C. A. Sec. 688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007.

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or precedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleadings and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing

and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Rule 434, If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court,